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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1472

JAMES J. CASHIN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	4
POINT I—Petitioner's constitutional rights were not infringed because there was probable cause to stop the vehicle in which he was a passenger	8
POINT II—Defendant's conviction was fully supported by the evidence	10
POINT III—The exhibition of petitioner's features was not a violation of his Fifth Amendment right against self-incrimination	14
CONCLUSION	16

Cases Cited

Adams v. Williams, 407 U.S. 143 (1972)	9
Brinegar v. United States, 338 U.S. 160 (1948)	9
Carroll v. United States, 267 U.S. 132 (1924)	9
Delaware v. Prouse, 440 U.S. 648 (1979)	9, 10
Dolson v. Anastasia, 55 N.J. 2, 6, 258 A.2d 706 (1969)	11
Draper v. United States, 358 U.S. 307 (1959)	9
Gilbert v. California, 388 U.S. 263 (1967)	15
Holt v. United States, 218 U.S. 245 (1910)	14, 15

PAGE

Jackson v. Virginia, —— U.S. ——, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 14-16

Schmerber v. California, 384 U.S. 757 (1966) 14, 15

State v. Balles, 47 N.J. 331, 221 A.2d 1, 4 (1966), cert. den. 388 U.S. 461 (1966) 11

State v. Jackson, 43 N.J. 148, 203 A.2d 1 (1964) cert. den. 379 U.S. 982 (1965) 10, 11

State v. Ravenell, 379 U.S. 982 (1965) 11

State v. Rodriguez, 141 N.J. Super. 2, 12, 357 A.2d 59, 61 (App. Div. 1976), certif. den. 71 N.J. 495, 366 A.2d 651 (1976) 10

State v. Sims, 65 N.J. 359, 373, 322 A.2d 809 (1974) ..10, 11

State v. Walker, 37 N.J. 208, 219, 181 A.2d 1, 7 (1962), cert. den. 371 U.S. 8850 (1962) 11

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 9

United States v. Chadwick, 433 U.S. 1, 12 (1977) 10

United States v. Dionisio, 410 U.S. 1, 5 (1973) 14, 15

United States v. Wade, 388 U.S. 218 (1967) 15

Wong Sun v. United States, 371 U.S. 471 (1963) 9

United States Constitution Cited

Amendment IV 2

Amendment V 2, 14

PAGE

Statutes Cited

N.J.S.A. 2A:90-2 3

N.J.S.A. 2A:90-3 3

Rule Cited

N.J. Ct. R. 2:10-1 3

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Opinions Below

The opinion of the Appellate Division, Superior Court of New Jersey, was rendered on November 16, 1979, affirming petitioner's conviction dated April 11, 1978 and appears in petitioner's appendix, pages 2A to 4A. On December 4, 1979, petitioner filed a Petition for Certification to the Superior Court, Appellate Division in

the New Jersey Supreme Court. The New Jersey Supreme Court Order denying defendant's Petition for Certification is reported at —— N.J. ——, —— A.2d —— (January 14, 1980) and appears in petitioner's appendix, page 1a. Thereafter, petitioner filed his Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Const. Amend. IV)

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense, to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself; nor to be deprived of life, liberty or property, with due process of law, nor shall private property be taken for public use, without just compensation. (U.S. Const. Amend. V)

New Jersey Statutes Annotated 2A:90-2.

Assault with intent to kill, commit burglary, kidnapping, rape, robbery, sodomy or carnal abuse.

Any person who commits an assault with intent to kill, or to commit burglary, kidnapping, rape, robbery or sodomy, or to carnally abuse a female under the age of 16, with or without her consent, is guilty of a high misdemeanor, and shall be punished by a fine of not more than $3000, or by imprisonment for not more than 12 years, or both. [N.J.S.A. 2A:90-2 (West, 1969, page 118-119)]

New Jersey Statutes Annotated 2A:90-3.

Assault with dangerous weapon, or demand of money, etc., by menaces or force, with intent to rob.

Any person who willfully or maliciously assaults another with an offensive weapon or instrument, or by menaces, force or violence demands of another any money or personal goods and chattels, with intent to rob such other person, is guilty of a high misdemeanor. [N.J.S.A. 2A:90-3 (West, 1969, page 125)]

New Jersey Court Rule 2:10-1.

Motion for New Trial as prerequisite for Jury Verdict Review; Standard of Review.

In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law. [R.2:10-1 (Gann Ed. 1980, page 333)]

Statement of the Case

Petitioner, James J. Cashin, was indicted by the Ocean County Grand Jury on April 24, 1975 and charged with assault with an offensive weapon (N.J.S.A. 2A:90-3) (Count I) and assault with intent to kill. (N.J.S.A. 2A:90-2) (Count II).

The charges against petitioner resulted from a shooting that occurred in a parking lot in 1972. At approximately 2:00 a.m. on Saturday, September 2, 1972, Mr. Robert Mathis, accompanied by his friend Mr. Nicholas Granozio, drove his employer's pickup truck into the parking area of the Tavern on the Mall in Brick Town. As he drove into the lot, a car was backing up blocking the driveway area. The car, occupied by a lone male, pulled forward. As Mr. Mathis began to drive around it, the car started to pull back again. Mr. Mathis drove around the vehicle and yelled at the car driver, "Thanks for moving, you son of a bitch."

Mr. Mathis passed the car, looked at the driver and continued around the building to the side where he stopped to park. The above-mentioned car pulled up next to Mr. Mathis' truck and the driver exited and approached the side of the truck. Mr. Mathis then exited his vehicle, walked to within two feet of the man and an argument ensued between them. Mr. Granozio also left the truck and stood nearby as the two men argued.

The argument lasted for about 1½ to 2 minutes. During that time Messrs. Mathis and Granozio observed the driver at close range in fairly good lighting provided by large overhead street-type lights.

After the initial confrontation the car driver walked back and entered his vehicle. Mr. Mathis followed him,

stood by the man's car looking in through the window at the man from a distance of about two feet and continued to argue with him. Mr. Granozio went over to Mr. Mathis, pulled on his arm and said, "Let's go." Before turning to return to the truck, Mr. Granozio noticed that the man "was fumblin' around under the glove compartment, somewhere. . . ." Likewise, Mr. Mathis observed the man, whom he positively identified in court as the defendant, reach over to the right hand side of the car.

Mr. Mathis had no opportunity to flee, for the defendant immediately produced a hand gun and fired a shot at close range which struck Mr. Mathis in the neck. Mr. Granozio, who had turned briefly away, heard the shot. When he then turned back, he observed the gun protruding from the car window.

Mr. Mathis slumped to one knee, and Mr. Granozio assisted him into the truck. The assailant immediately drove from the scene. Mr. Granozio transported Mr. Mathis to Point Pleasant Hospital where he was treated for the gunshot wound which entered the front and exited from the rear of his neck.

In late August or early September 1974, Mr. Mathis was contacted by Dover Township Police Officer James Vuccolo, who was then on temporary assignment as an undercover investigator with the Ocean County Prosecutor's Office. At that time, Officer Vuccolo was recently assigned to the continuing investigation of the shooting incident in question and he met with Mr. Mathis to discuss the incident.

At about midnight on October 23, 1974, Officer Vuccolo called Mr. Mathis at his home and asked him to meet him at the Wobbly Barn Tavern in Toms River regarding his case.

Officer Vuccolo met Mr. Mathis at that location at about 12:50 a.m. and asked him to look around the establishment to see whether he could identify anyone as his assailant. As requested, Mr. Mathis walked around the bar area. There were about 50 or 60 persons present at the time. The lighting was subdued, but Mr. Mathis had no difficulty seeing. Mr. Mathis observed his assailant, later identified as defendant Cashin, sitting with a man whom he recognized as Jack Finley. He pointed the defendant out to Officer Vuccolo and indicated that he was the man who shot him. He had no doubt. Mr. Mathis waited with Officer Vuccolo until the lights were turned up at closing time at about 1:50 a.m., again viewed the defendant and pointed him out to the officer.

Mr. Mathis then accompanied Officer Vuccolo to his unmarked police car, which was parked facing the tavern entrance. When the defendant later exited with Mr. Finley, Mr. Mathis, pointed him out again saying, "That's the man." Mr. Finley then drove off accompanied by the defendant. Mr. Mathis and Officer Vuccolo followed.

Officer Vuccolo radioed for assistance from the Dover Township Police and requested that the Finley vehicle be stopped. Dover Township Police responded to the request and stopped the vehicle on Route 37. Officer Vuccolo and Mr. Mathis observed the stop and drove up to the scene. Mr. Mathis, thereupon, exited the officer's car and in light provided by the spotlight of the police vehicle which stopped Finley's car, was able to observe that the passenger was the defendant, the man who he had pointed out at the Wobby Barn. Officer Vuccolo utilized the above procedure to independently establish the name of the man identified earlier by the victim without exposing his own undercover status.

On April 30, 1975, Investigator Steven Belitrand of the Ocean County Prosecutor's Office, accompanied by Officer Vuccolo, went to the home of Mr. Granozio. Investigator Belitrand showed eight photographs to Mr. Granozio at that time. Investigator Belitrand asked Mr. Granozio to look through all of the photographs to see whether he could pick out the man who shot Mr. Mathis. Mr. Granozio picked out one photograph, the defendant's picture, and said "This was the man who shot Bobby." At Investigator Belitrand's request Mr. Granozio then signed the back of photograph which he had selected.

A jury trial was held on April 5 through 11, 1978 before the Honorable Mark Addison, J.C.C., and petitioner was found guilty of assault with an offensive weapon and assault with intent to kill.

On June 22, 1978, Judge Addison heard and denied petitioner's motion for a new trial and, thereupon, proceeded to the matter of sentencing. Defendant was sentenced to New Jersey State Prison for a term of one to three years on Count I and a concurrent term of one to three years on Count II.

A Notice of Appeal was filed on July 19, 1978. On November 16, 1979, the Appellate Division of the Superior Court of New Jersey affirmed petitioner's convictions in an unreported decision. On January 14, 1980, the New Jersey Superior Court denied defendant's petition for certification.

On February 8, 1980, petitioner made a Motion for a New Trial, based upon the alleged post-trial recantation testimony of the victim, Robert Mathis. This motion was denied by Judge Addison. On April 1, 1980, Petitioner filed a Notice of Appeal in the New Jersey Courts from the denial of the above motion for a new trial.

POINT I

Petitioner's constitutional rights were not infringed because there was probable cause to stop the vehicle in which he was a passenger.

Petitioner alleges that he was unconstitutionally seized when the vehicle in which he was traveling was stopped and the victim, Mr. Mathis, positively identified him as his assailant. Petitioner maintains that there was no probable cause to stop the vehicle and argues that his constitutional rights were infringed when his image was seized. The State contends that there was probable cause to stop the automobile defendant was traveling in and submits that, in any event he had no expectation of privacy in the image of his person.

In the instant case, Mr. Mathis accompanied officer Vuccolo to the Wobbly Bar on the evening of October 23, 1974. The officer requested that Mr. Mathis look around the establishment to see whether he could identify anyone as his assailant. Mathis identified petitioner as his attacker. Later in the evening, when the lights were turned up in the bar, Mathis again identified petitioner as his assailant and pointed him out to Officer Vuccolo.

Mr. Mathis then accompanied Officer Vuccolo to his unmarked police car, which was facing the tavern entrance. When defendant exited to drive off with Mr. Finley, Mr. Mathis again identified petitioner and pointed him out to Vuccolo. Mr. Mathis and Officer Vuccolo then followed the Finley vehicle. Officer Vuccolo radioed for assistance from the Dover Township Police and requested that the vehicle be stopped. Officer Vuccolo requested the stop because he had probable cause to believe that defendant was the individual who shot Mr. Mathis and he

wished to independently establish a record of the previously identified man's name and identity without exposing his own undercover investigative status.

The Dover Township Police stopped the vehicle petitioner was traveling in, and Officer Vuccolo then drove up to the scene with Mr. Mathis. In the light provided by a search light on the police vehicle which stopped Finley's car, Mr. Mathis was able to observe that the passenger, who was there identified as defendant Cashin, was the man he had positively identified earlier at the tavern.

Probable cause exists where the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Wong Sun* v. *United States,* 371 U.S. 471, 479 (1963); *Brinegar* v. *United States,* 338 U.S. 160, 175 (1948); *Carroll* v. *United States,* 267 U.S. 132, 162 (1924).

In the instant case, petitioner had been positively identified by Mr. Mathis as the man who attacked him. This reliable and first hand information was sufficient to warrant a man of reasonable caution in the belief that a crime was committed and that defendant was the perpetrator. *Draper* v. *United States,* 358 U.S. 307 (1959). Clearly, there was probable cause to stop the vehicle in which defendant was a passenger.

Moreover, this court has held that the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or criminal to escape. *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 881 (1975); *Adams* v. *Williams,* 407 U.S. 143, 145-146 (1972). See, *Delaware* v. *Prouse,* 440

U.S. 648 (1979). On the contrary, a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Id.*

Finally, petitioner alleges that his image was unconstitutionally seized. The State submits that petitioner's image was not unconstitutionally seized, since, as noted earlier, there was probable cause for the stop. Moreover, the State asserts that petitioner had no expectation of privacy in his image because when the automobile in which he was a passenger was validly stopped his person was in plain view. *United States* v. *Chadwick,* 433 U.S. 1, 12 (1977). Petitioner was not forced to exit the vehicle but remained in the automobile, during which time the victim observed his face and identified him as his assailant.

Thus, it is clear that petitioner's constitutional rights were not infringed and therefore, his petition for Writ of Certiorari should be denied.

POINT II

Defendant's conviction was fully supported by the evidence.

It is well settled that a verdict will not be set aside as against the weight of the evidence "unless it clearly appears that there was a miscarriage of justice under the law." See New Jersey Court Rule 2:10-1. *State* v. *Sims,* 65 N.J. 359, 373-74, 322 A.2d 809, 816 (1974); *State* v. *Rodriguez,* 141 N.J. Super. 2, 12, 357 A2d 59, 61 (App. Div. 1976), certif. den. 71 N.J. 495, 366 A2d 651 (1976). It is also well established that the trier of fact will determine the credibility of the witness. See, *e.g. State* v.

Jackson, 43 N.J. 148, 203 A2d 1 (1964), *cert.* den. *sub nom. State* v. *Ravenell,* 379 U.S. 982 (1965); *State* v. *Walker,* 37 N.J. 208, 219, 181 A2d 1, 7 (1962), *cert.* den. 371 U.S. 8850 (1962).

The function of the appellate court is not to reweigh the evidence for independent determination, but is limited to correcting injustice where there is an inescapable conclusion of obvious error by the trier of fact. *State* v. *Balles,* 47 N.J. 331, 337, 221 A2d 1, 4 (1966), *cert.* den. 388 U.S. 461 (1966). "No legitimate purpose can be served by dissolving a jury verdict justly rendered." *State* v. *Sims,* 65 N.J. at 374, 322 A2d at 816. A reviewing court should accord great deference to the trial judge with respect to those tangible aspects of the case not transmitted by the written record, such as witness credibility and demeanor and the "feel of the case." *State* v. *Sims,* 65 N.J. at 373, 322 A2d at 816; *Dolson* v. *Anastasia,* 55 N.J. 2, 6-7 258 A2d 706, 709 (1969).

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson* v. *Virginia,* —— U.S. ——, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979). The relevant question is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia, supra* at 99 S.Ct. 2789.

The testimony of Ralph Mathis and that of the eyewitness, Nicholas Granozio, overwhelmingly established that Mr. Mathis was grievously wounded by his assailant, who in the course of an argument produced a handgun and without warning immediately fired at close range

striking the victim in the neck. The fact of the assault was undisputed and not a matter of controversy as counsel below readily conceded. The thrust of defendant's present contention is an attack upon the credibility of the positive identification of the defendant by Mr. Mathis.

Both Officer Vuccolo and Mr. Mathis testified that Mr. Mathis positively identified the defendant as his assailant while at the Wobbly Barn Tavern on the night of October 23, 1975. Mr. Mathis unswervingly identified the defendant again in court as his assailant. Mr. Granozio testified that he had selected and signed a photograph of a man "as resembling" the assailant in an out-of-court photographic viewing conducted by Investigator Steven Belitrand. Though he was not able to again select that picture in court, or identify anyone in court as the assailant, he did acknowledge his signature on the reverse side of the defendant's photograph. Investigator Belitrand, who conducted the photographic identification procedure in which Mr. Granozio selected defendant's picture, testified that Mr. Granozio picked out the defendant's photograph from a group of eight and handed it to him stating positively, "This was the man that shot Bobby." Clearly then, the State produced ample evidence, which, if believed, established the defendant's identity as the assailant.

In addressing defendant's arguments, the State respectfully submits that the alleged contradictions and conflicts to which defendant points in attacking Mr. Mathis' testimony regarding his description of the assailant and his vehicle do not seriously undermine the credibility of his positive identification of the defendant. While defendant suggests that Mr. Mathis' descriptions changed materially from the time of the shooting incident to the time of trial, perusal of his testimony reveals that while he recalled giving a description of both his assailant and his car while

at the hospital, he could not, because of his injured condition at that time, recall with certainty the descriptions he then rendered. Nevertheless, at trial he recalled his assailant as being between five feet eight inches and six feet tall, as having a stocky build, no moustache, dark and gray hair, combed back, and as appearing to be in his forties. Mr. Mathis also recalled that he initially informed the police that the assailant's vehicle resembled a Buick Riviera with a "square" or "boxed in" back, and that it was dark colored either deep blue or black. Mr. Mathis explained, however, that upon leaving the hospital he informed an investigating State Police officer that he was unsure of the make of car and that it could have been a Mercedes Benz.*

It must also be observed that the witnesses were vigorously cross-examined by experienced counsel and that all of the weaknesses currently alleged were fully pointed up in his summation. It is apparent, therefore, that any alleged weaknesses in Mr. Mathis' testimony gave rise only to a question of credibility which the jury was uniquely situated to resolve. After reviewing the record with particularized attention to the identification issue, the trial court held, in denying defendant's Motion for a New Trial, that based on the testimony presented the jury could find the defendant guilty beyond a reasonable doubt.

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* Defendant refers in his Petition to a post-trial statement made by Mr. Mathis on the identification issue. This statement was not part of the record below and should not be considered by this Court in determining the merits of defendant's petition. In fact, petitioner made a motion to expand the record to include this statement, which was denied by the Appellate Division of the New Jersey Superior Court. This alleged post trial recantation testimony was the basis of a motion for a new trial which was denied by the trial judge and is the subject of another appeal in the New Jersey Courts.

For the foregoing reasons, the State respectfully submits that the evidence below clearly established that a rational trier of fact could reasonably have found petitioner guilty of the instant offenses.

POINT III

The exhibition of petitioner's features was not a violation of his Fifth Amendment right against self-incrimination.

Petitioner contends that his Fifth Amendment right against self-incriminaton was infringed when he was compelled to show his features to the victim of the instant offense and was positively identified as his assailant. Petitioner alleges that the viewing of his face by the victim was the equivalent of forcing him to make a statement against himself and therefore he should have been given *Miranda* warnings. The State submits that defendant's right against self-incrimination was not infringed by the identification of his person and that *Miranda* warnings were not required since defendant was not subject to a custodial interrogation.

It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination. *United States* v. *Dionisio,* 410 U.S. 1, 5-6 (1973); *Holt* v. *United States,* 218 U.S. 245, 252 (1910). The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. *United States* v. *Dionisio, supra* at 6; *Schmerber* v. *California,* 384 U.S. 757, 763 (1966); *Holt* v.

United States, supra at 252-253. Both federal and state courts have usually held that the privilege against self-incrimination offers no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk; or to make a particular gesture. *United States* v. *Dionisio,* 410 U.S. 1 (1973) [voice exemplars]; *Gilbert* v. *California,* 388 U.S. 263 (1967) [hand writing exemplars], *United States* v. *Wade,* 388 U.S. 218 (1967) [defendant compelled to say words allegedly said by robber]; *Schmerber* v. *California,* 384 U.S. 757 (1966) [blood samples]; *Holt* v. *United States,* 218 U.S. 245 (1910) [defendant required to put on blouse for identification purposes].

The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling communication or testimony, but that compulsion which makes a suspect or accused the source of real or physical evidence does not violate it. *United States* v. *Dionisio, supra; Gilbert* v. *California, supra* at 266-267; *Schmerber* v. *California, supra.* Thus, there is no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. *United States* v. *Wade,* 388 U.S. 218, 222 (1967).

Finally, the State submits that petitioner's allegation that he should have been informed of his *Miranda* rights before the victim was permitted to identify him is patently frivolous. It is clear that the four-fold warnings enunciated in *Miranda* v. *Arizona,* 384 U.S. 436 (1966) need only be administered to and waived by an individual when he is subjected to State initiated custodial interrogation.

In the instant case, petitioner was not subjected to a custodial interrogation, therefore *Miranda* warnings were not required and his petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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